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TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

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No. 667

THE UNITED STATES, PETITIONER

vs.

HARRY A. KAPLAN

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ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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PETITION FOR CERTIORARI FILED JANUARY 4, 1938

CERTIORARI GRANTED FEBRUARY 14, 1938

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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In the Court of Claims

No. 42901

HARRY A. KAPLAN, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

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I. *Petition*

Filed January 23, 1935

*Before the honorable the Chief Justice and the Judges of the Court of Claims:*

I

The plaintiff, a citizen of the United States and a resident of the City of New York, County of New York, files this petition to recover from the United States of America, \$2,084.20 or such greater amount as may be legally due, being the amount due your plaintiff to the United States as and for income taxes erroneously and illegally assessed and collected from the plaintiff by the Commissioner of Internal Revenue of the United States, together with interest thereon at 6 per cent per annum from March 15, 1930, to the date of refund.

II

The Commissioner of Internal Revenue, at all times hereinafter mentioned, was an officer of the United States duly qualified and appointed to act for and on behalf of the United States in all matters hereinafter set forth.

Upon information and belief, your plaintiff avers that the each and every sum hereinafter stated to have been paid by him, was paid to the Collector of Internal Revenue for the Second District of New York at New York City, New York, and was thereafter turned over and deposited with the Treasurer of the United States of America in the usual course of official business.

III

The plaintiff duly filed his Federal income tax return for the tax year 1929 on March 15, 1930, and paid the tax due thereon at the time and in the manner provided by law.

## IV

Included in the aforesaid return for the taxable year 1929, referred to in Paragraph III above, was an item of \$194,000.00, which the plaintiff erroneously reported as profit from the sale during the year 1929 of 25 shares of stock in 1100 Park Avenue and upon which erroneous profit the plaintiff erroneously paid, on March 15, 1930, a tax of not less than \$2,084.20 to the Collector of Internal Revenue for the Second District of New York.

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## V

During the year 1929 the plaintiff sold said 25 shares of stock in 1100 Park Avenue for \$250,000.00 and paid a commission on said sale of \$10,000.00, leaving a net selling price of \$240,000.00. The 25 shares of stock cost the plaintiff \$46,000.00. The plaintiff erroneously reported on his Federal income tax return the sum of \$194,000.00 as profit on the sale taxable for the year 1929. Said reported profit on the sale was computed by plaintiff by subtracting \$46,000.00 (cost price) from \$240,000.00 (net selling price).

However, under the terms of the agreement of sale the plaintiff received \$25,000.00 down on the date of the sale of the stock and the balance of the purchase price was payable by the vendee in monthly installments of \$1,875.00 each over a period of ten years.

In all the plaintiff received from the sale during the year 1929 the sum of \$30,625.00, which was less than 40 per cent of the amount of the purchase price of \$250,000.00.

## VI

The plaintiff erroneously and mistakenly reported a 1929 profit of \$194,000.00 from the sale of the 25 shares of stock in 1100 Park Avenue in that he kept his books of account and filed his Federal income tax returns on the cash receipts and disbursements basis and the \$194,000.00 reported as profit in 1929 from the sale did not correctly reflect the taxpayer's taxable income from the sale in 1929.

The plaintiff was lawfully entitled to report the profit from the sale of the stock on the installment basis in that the payments received from the sale during 1929 were less than 40 per cent of the sale price and the balance of the sale price was to be paid in monthly installments over a period of ten years.

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## VII

The error in reporting the profit from the sale of the 25 shares of stock in 1100 Park Avenue for the year 1929 was called to the attention of the Internal Revenue Agent who audited plaintiff's return for the year 1929 and said Revenue Agent recommended a refund of \$2,084.20 to the plaintiff for the year 1929 on the ground that only



\$24,755.20 profit from the sale was taxable to plaintiff for the year 1929, computed as follows:

Total cash received 1929	\$30,625.00
% Net selling price to Net profit	808333
% multiplied by cash received equals profit applicable to 1929	24,755.20
Profit reported 1929	194,000.00
Profit applicable to subsequent years	\$169,244.80

The plaintiff thereupon and within two years from the date of payment of the tax of \$2,084.20 on March 15, 1930, duly filed with the Collector of Internal Revenue for the Second District of New York a claim for the refund of said \$2,084.20 with interest as required by law.

### VIII

The Commissioner of Internal Revenue rejected the aforesaid claim for refund by registered mail on January 24, 1933.

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### IX

The Commissioner of Internal Revenue erroneously and unlawfully rejected the aforesaid claim for refund and erroneously and illegally assessed the tax of \$2,084.20 for the year 1929 and the Collector of Internal Revenue for the Second District of New York erroneously and illegally collected said tax of \$2,084.20 in that the plaintiff was rightfully and lawfully entitled to report the 1929 profit on the sale of the 25 shares of stock on the installment basis.

### X

Your plaintiff is not afforded an appeal to any department of the Bureau of Internal Revenue nor to any other department of the Executive branch of the Government from the action of the Commissioner of Internal Revenue in rejecting his application for relief as hereinabove set forth. No action upon this claim, other than that herein stated, has been taken before Congress or other of the departments of the United States, or in any court other than the petition filed in this court.

### XI

Your plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government. Your plaintiff is the sole and absolute owner of the claim herewith presented and has made no transfer or assignment of said claim or of any part thereof, and is justly entitled to the amount claimed herein from the United States after allowing all just credits and set-offs.

## XII

Your plaintiff believes the facts as herein stated to be true.

Wherefore, your plaintiff prays judgment in his favor and against the United States of America for the sum of \$2,084.20 for 1929 income taxes erroneously and illegally collected from him and for interest at six per cent per annum from March 15, 1930, to the date of refund and for such other and further relief as in the premises to this Court may seem meet and proper.

(Signed) LLEWELLYN A. LUCE,  
937 Munsey Building, Washington, D. C.,  
Attorney for Plaintiff.

[Duly sworn to by Llewellyn A. Luce; jurat omitted in printing.]

## II. General traverse

Filed March 4, 1935

And now comes the Attorney General, on behalf of the United States, and answering the petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

FRANK J. WIDEMAN,  
Assistant Attorney General.

## III. Argument and submission of case

On February 8, 1937, this case was argued and submitted by Mr. Llewellyn A. Luce, for plaintiff, and by Mr. George W. Billings, for defendant.

8 IV. Special findings of fact, conclusion of law and opinion  
of the court by Littleton, J.

Filed April 26, 1937

Mr. Llewellyn A. Luce for the plaintiff.

Mr. George W. Billings, with whom was Mr. Assistant Attorney General Robert H. Jackson, for the defendant.

Mr. Robert N. Anderson and Mr. Fred K. Dyar, Special Assistants to the Attorney General, were on the brief.

Plaintiff seeks to recover \$2,084.20, income tax alleged to have been overpaid for 1929, on the ground that the profit from the sale of twenty-five shares of stock in that year should have been computed on the installment basis under section 44 of the Revenue Act of 1928 and Treasury Department regulations. A claim for refund was duly filed and rejected.

*Special findings of fact*

A joint income-tax return of plaintiff, Harry A. Kaplan, and his wife, Ethel, for the year 1929 was filed March 15, 1930, indicating a tax of \$2,084.20 which was paid—\$584.20 on March 17, 1930, the balance of \$1,500 in the amount of \$500 each on June 13, October 16, 1930, and \$500 on July 23, 1931. For 1929 and all subsequent years plaintiff kept his books of account and made his annual tax returns on the cash receipts and disbursements basis. Included in gross income in the return was an amount of \$194,000, the difference between a net selling price of \$240,000 and a purchase price of \$46,000 paid in June 1928 for shares of stock in "1100 Park Avenue" which Harry A. Kaplan, April 11, 1929, agreed to sell under a contract whereby the purchaser to pay \$250,000 as follows: \$25,000 down and \$225,000 in monthly installments of \$1,875 beginning October 1, 1929, together with interest, the shares in the meantime to be deposited in escrow. The plaintiff in 1929 paid \$10,000 commission on the transaction, making the net selling price to him \$240,000. On December 28, 1929, plaintiff agreed to an assignment made September 23, 1929, by the purchaser of his obligations under the contract to a third party, the Comas Holding Corporation.

During 1929 plaintiff received from the purchaser or his assignee \$25,000 on the sales contract; in 1930 he received \$22,500 in monthly installments of \$1,875; and in the first three months of 1931, \$5,601.51, after which time the agreed payments ceased. By agreement of August 12, 1931, between Ethel Kaplan, to whom plaintiff had assigned his interest in the contract for a nominal consideration, and Comas Holding Corporation, the balance of \$191,273.49 was to be paid \$2,273.49 down and \$2,000 monthly beginning September 1, 1931. In 1931 there was paid to plaintiff on the revised agreement \$73.49 to the end of October, at which time payments again ceased. A further agreement was entered into March 19, 1932, between Ethel Kaplan and the Samuel Silver Realty Co., Inc., whereby the former agreed to sell the same shares of stock to the latter for \$75,000, payable \$750 down and the balance in monthly installments of \$750 beginning April 10, 1932.

Plaintiff filed a joint income-tax return for himself and wife for 1930 on March 16, 1931, showing no taxable income and no sale of stock in "1100 Park Avenue" or profit or loss thereon. Plaintiff filed no income-tax returns either for 1931 or 1932.

Internal Revenue Agent in Charge, R. T. Miles, New York City, notified plaintiff by letter November 18, 1931, of his decision, after audit and investigation of the 1929 return, to recommend an overassessment of \$2,084.20 for 1929, conceding plaintiff's right to compute the tax on the sale here involved on the installment basis.

February 29, 1932, the Commissioner of Internal Revenue notified plaintiff of his disapproval of the internal revenue agent's report and stated that no overassessment was disclosed.

4. March 12, 1932, plaintiff filed a claim for the refund of \$2,084.20 for 1920 on the ground that he was lawfully entitled to report the stocks-sale transaction on the installment basis. The Commissioner of Internal Revenue rejected this claim January 23, 1933.

### *Conclusion of law*

Upon the foregoing special findings of fact, which are made, a part of the judgment herein, the court decides, as a conclusion of law, that plaintiff is entitled to recover \$2,084.20 with interest as provided by law.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States two thousand eighty-four dollars and twenty cents (\$2,084.20) with interest at the rate of 6% per annum on \$584.20 thereof from March 7, 1930, and on \$500 from June 13, 1930, on \$500 from October 16, 1930, and on \$500 from July 23, 1931, to such date as the Commissioner of Internal Revenue may determine in accordance with the provision of section 177 (b) of the Judicial Code, being a part of the Revenue Act of 1928.

### *Opinion*

LITTLETON, Judge, delivered the opinion of the court:

The provisions of section 44 (a), (b), and (c) of the Revenue Act of 1928 and the applicable portions of Art. 351 of Treasury Regulations 74 are set forth in the margin.<sup>1</sup> Subdivision 11 (b) (1) of section 44 governs this case. This was a casual sale in 1929 of personal property for a price in excess of \$1,000 and the initial payment was less than 40% of the selling price. Plaintiff, therefore, was entitled to report this transaction on the installment basis and to return as income therefrom in 1929 that proportion of the installment payments actually received in that year which the

<sup>1</sup> Sec. 44. (a) Dealers in Personal Property. Under regulations prescribed by the Commissioner with the approval of the Secretary, a person who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the gross profit realized or to be realized when payment is completed, bears to the total contract price.

(b) Sales of Realty and Casual Sales of Personalty. In the case (1) of a casual sale or other casual disposition of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year), for a price exceeding \$1,000, or (2) of a sale or other disposition of real property, if in either case the initial payments do not exceed 30 per centum of the selling price (or, in case the sale or other disposition was in a taxable year beginning prior to January 1, 1934, the percentage of the selling price prescribed in the law applicable to such year), the income may, under regulations prescribed by the Commissioner with the approval of the Secretary, be returned on the basis and in the manner above prescribed in this section. As used in this section the term "initial payments" means the payments received in cash or property other than evidences of indebtedness of the purchaser during the taxable period in which the sale or other disposition is made.

(c) Change from Accrual to Installment Basis. If a taxpayer entitled to the benefits of subsection (a) elects for any taxable year to report his net income on the installment basis, then in computing his income for the year of change or any subsequent year, amounts actually received during any such year on account of sales or other dispositions of property made in any prior year shall not be excluded.

Regs. 74, Art. 351: " \* \* \* In the case of a casual sale or other casual disposition of personal property other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, for a price exceeding \$1,000, income may be returned on the installment basis provided the payments received in cash or property other than evidences of indebtedness of the purchaser during the taxable year in which the sale or other disposition is made do not exceed 40 per cent of the selling price. \* \* \*"

gross profit realized or to be realized, when payment was completed, bore to the total contract price.

The only defense made by counsel for the defendant is that plaintiff, having made an election to report in his return for 1929 the sale of this stock as a completed transaction reflecting a profit of \$194,000, is unalterably bound by that election and cannot have his tax for 1929 determined on the basis of an installment sale so far as that transaction is concerned. We think there is no merit in this contention. Section 44 contains no language which may be construed

as imposing upon a taxpayer, in a case such as the one at bar, a binding and irrevocable election when such taxpayer erroneously and mistakenly reports in his return for the taxable year the entire profit which it appears at the time may be ultimately received from the transaction, when, as a matter of fact and law, the transaction is an installment sale within the meaning of the federal taxing act and the regulations upon which the taxpayer is entitled to report as income therefrom in the taxable year that proportion of the installment payments actually received in such year which the gross profit realized or to be realized, when payment is completed, bears to the total contract price. *Davis v. United States*, 71 C. Cls. 444, 46 Fed. (2d) 377. *S. J. Schneider, Trustee of Estate of Bagby-Howe Drug Co., Bankrupt, v. Lucas* (15 A. F. T. R. 572), reversed on other grounds in *Lucas v. Schneider*, 47 Fed. (2d) 1006. See also *G. C. M.* 2367, VI-2 C. B. 172; *G. C. M.* 13466, XIII-2 C. B. 144.

Counsel for defendant seem to base their claims for a binding election upon the words "may return as income", found in subdivision (a) of section 44 of the Revenue Act of 1928, but these installment-sales provisions of the statute were dealing with all classes of installment sales, and we think it is clear that Congress did not intend that a taxpayer employing the cash receipts and disbursements basis of accounting who might report in the year of a sale an entire anticipated profit not actually received could not, if the amount of the initial payments received in such taxable year did not exceed 40% of the sales price, have his tax for such year later computed on the installment-sales basis. The Treasury Regulations did not so interpret the statute. The statute merely states that the income from an installment sale may be reported in the manner prescribed. It is clear that the words "may return" were used to permit the large number of taxpayers engaged in the installment-sales business to use either the accrual method or the installment-sales method of reporting income, and even where the former is used the statute permits a change to the installment method. The regulations do not so much as imply that a choice of computing profit on one or the other method in reporting a casual sale of property shall be construed as a binding election.

The statute gives the Commissioner no discretionary power to reject a timely claim for refund or to refuse to compute a tax-



payer's income in a case like the one at bar where the taxpayer on the cash receipts and disbursements basis receives in the taxable year less than 40% of the sales price under an installment-sales contract. Moreover, the basis on which plaintiff reported the transaction in his return for 1929 and the basis on which the Bureau held him taxable when the claim for refund was finally rejected in 1933 did not clearly reflect plaintiff's income. In March 1932, almost a year before the Commissioner rejected plaintiff's refund claim, the contract of sale of the stock in question was changed and the then unpaid purchase price thereof was reduced to \$75,000. The maximum amount which plaintiff therefore could ever receive under the contract for sale of the stock was \$139,999 instead of a net selling price of \$240,000, which is \$54,000 in excess of the sum stated as profit in the return for 1929.

Counsel for defendant endeavors to make the point that if plaintiff is permitted to recover in this case the Government may lose some tax on the installment payments received in 1930 and that plaintiff will also escape tax on the installment payments received in 1931 and 1932. The years 1931 and 1932 may be disregarded for the reason that plaintiff filed no returns for those years and any tax that might be due may still be collected. Any tax that may be barred for 1930 on the installment payments received in that year is barred because of the decision made by the Bureau of Internal Revenue at a time when any tax which might have been due by plaintiff for the year 1930 was not barred. The Internal Revenue Agent in Charge at New York filed with the Commissioner a report in November 1931 showing a computation of plaintiff's tax for 1929 on the installment basis and disclosing an overpayment of \$2,084.20. The Bureau rejected this computation, refused to compute plaintiff's tax for 1929 on the installment basis, and notified the plaintiff of that fact by letter of February 29, 1932. This view was adhered to until the final rejection of the claim for refund January 23, 1933.

14 Plaintiff is entitled to recover and judgment will be entered in favor of plaintiff for \$2,084.20, with interest as provided by law. It is so ordered.

WHALEY, Judge; WILLIAMS, Judge; GREEN, Judge; and BOOTH, Chief Justice, concur.

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#### V. Judgment

At a Court of Claims held at the City of Washington on the 26th day of April A. D., 1937, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that plaintiff is entitled to recover.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States two thousand eighty-four dollars and

ty cents (\$2,084.20) with interest at the rate of 6% per annum  
\$584.20 thereof from March 7, 1930, and on \$500 from June 13,  
0, on \$500 from October 16, 1930, and on \$500 from July 23, 1931,  
such date as the Commissioner of Internal Revenue may deter-  
ne in accordance with the provision of section 177 (b) of the  
ficial Code, being a part of the Revenue Act of 1928.

VII. *Proceedings after entry of judgment*

On June 24, 1937, the defendant filed a motion for a new trial.  
On October 4, 1937, the court entered the following order on said  
tion:

ORDER

It is ordered this 4th day of October 1937, that the defendant's  
motion for new trial be and the same is overruled.

[Clerk's certificate to foregoing transcript omitted in print-  
ing.]

Endorsement on cover:] File No. 42148. Court of Claims. Term  
. 667. The United States, petitioner, vs. Harry A. Kaplan. Peti-  
n for a writ of certiorari and exhibit thereto. Filed January 4,  
88. Term No. 667 O. T. 1937.

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Supreme Court of the United States

*Order allowing certiorari*

Filed February 14, 1938

The petition herein for a writ of certiorari to the Court of Claims is granted, and the case is assigned for argument immediately following No. 528.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice REED took no part in the consideration or decision of this application.